IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~906~~ 104

PARMELEE TRANSPORTATION CO.,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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DECISIONS BELOW

The opinion of the District Court is reported in 136 F. Supp. 476. For opinion, findings and conclusions see Tr. 99-112, 151-160.[1]

The opinion of the United States Court of Appeals for Seventh Circuit is reported in 240 F. 2d 930, and is printed in appendix to statement as to jurisdiction, pp. 18a-33a.

[1] The printed transcript of record filed in the Court of Appeals has been filed in number 905 and is hereafter referred to as "Tr."

RELATION OF APPEAL AND CERTIORARI PROCEEDINGS

Parmelee Transportation Company filed a statement as to jurisdiction and a petition for certiorari which are identical in substance. In response we filed a motion to dismiss the appeal or to affirm the judgment and this brief in opposition to certiorari which are also identical in substance. We suggest that it is not necessary for the Court to read both of our documents, since a complete understanding of our position may be obtained by reading one.

I

PETITIONER LACKS STANDING TO SEEK CERTIORARI

Petitioner was granted permissive intervention under Rule 24(b) by the District Court (Tr. 65-70), but that fact and petitioner's participation in the proceedings below do not suffice to give petitioner status to seek review here. *City of Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577, 578 (1931).

Petitioner's petition for leave to intervene in the District Court (Tr. 58-61) does not disclose any interest that would give petitioner standing here and there is nothing elsewhere in the record to support petitioner's standing. Petitioner's contract with the railroads expired on September 30, 1955 (petition p. 6), and petitioner has failed to allege or show that it will ever have another such contract. The contract for interstation transfer is entirely within the power of the railroads to award or deny; petitioner cannot compel the railroads to award a contract to it and cannot interfere with the existing contract between the railroads and Transfer. *Donovan* v. *Pennsylvania Company*, 199 U.S. 279, 295-296 (1905); *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U.S. 469 (1933).

Under these facts petitioner has no standing to seek review here. *City of Chicago* v. *Chicago Rapid Transit Co.*,

supra, 284 U.S. 577, 578 (1931); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Singer* v. *Union Pacific Railroad Co.*, 311 U.S. 295 (1940); *New Orleans, M.&T.R. Co.* v. *Ellerman*, 105 U.S. 166, 173 (1882); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 117 (1939); *Ex Parte Levitt*, 302 U.S. 633, 634 (1937). Under these authorities petitioner has no separate justiciable interest that would or could be affected by decision of the questions it presents here.

Petitioner is not helped by such cases as *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), and *Alton Railroad Co.* v. *United States*, 315 U.S. 15 (1942). They involved the economic protection of franchise rights. Petitioner claims no franchise to conduct interstate commerce and in any event the City could not grant one. Nor do cases like *Wolpe* v. *Poretsky*, App. D.C., 144 F. 2d 505 (1944), cert. den. 323 U.S. 777, help petitioner; instead they illustrate by contrast petitioner's lack of any interest that can be protected by review. In *The Atchison, Topeka and Santa Fe Railway Co.* v. *Summerfield*, App. D.C., 229 F. 2d 777 (1956), cert. den. 351 U.S. 926, justiciable interest was based on the statutory obligation of the railroads to carry all mail offered to them. The cases cited in this paragraph are fair examples of the interest required to litigate governmental questions. They illustrate clearly that petitioner is conspicuously lacking in any qualification to seek review.

No right of petitioner has been invaded any more than the right of the general public not to have the ordinance violated. Manifestly, petitioner could not have maintained an independent suit of its own to restrain violation of the ordinance by Transfer. As the Court said in *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U.S. 113, 125 (1940):

"Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

II

PETITIONER HAS NOT STATED ADEQUATE REASONS FOR GRANTING THE WRIT

We address this part of the brief to the "Reasons For Granting the Writ," stated in parts I to V, pp. 9 to 30.

1.

ANSWER TO PETITIONER'S PARTS I AND V

Petitioner's parts I and V and much of other parts are based on the erroneous notion that the Court of Appeals held invalid all of Chapter 28 of the Chicago Municipal Code. The Court held only § 28-31.1 invalid, thus leaving in effect all of the regulatory provisions under which the interstation transfer service had been conducted for many years prior to July 26, 1955. The sole issue is the validity of § 28-31.1, and that issue presents no question of substance.

Petitioner says (petition p. 9) that the Court held invalid all of Chapter 28 of the Chicago Municipal Code (app. to petition pp. 1a-17a). This is not correct. It is clear that the Court struck down only § 28-31.1 of Chapter 28 (pp. 16a-17a), thereby leaving all of the rest of Chapter 28 unaffected. See the Court's Opinion (pp. 30a-33a). The Court said (top p. 30a):

> "We are thus led to conclude that there is no valid legal basis for the above-cited provisions of § 28-31.1 of the 1955 ordinance."

The words "1955 ordinance" were defined by the Court as the amendment of July 26, 1955, by footnote 13 to the

Opinion (app. to petition p. 23a). The footnoted sentence further identified the amendment of 1955 as "the ordinance now under attack" (p. 23a). All of the Court's conclusions in respect to invalidity relate only to § 28-31.1.

The Court pointed out carefully (pp. 30a-32a) that all of Chapter 28 relating to terminal vehicles, except § 28-31.1, applies to and may be enforced against respondents, saying in part (top p. 31a):

> "If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,[24] the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17, the City may proceed against it according to the penalties section."

[24] "Ch. 28, Chicago Municipal Code."

In those sentences the Court is obviously referring to live and applicable provisions. It is clear that the words "prior ordinance" do not mean something defunct. Those words were defined by the Court by footnote 10 to the Opinion to mean and to be used as a short reference to Chapter 28 as it stood before § 28-31.1 was added (app. to petition p. 21a).

Chapter 28 had been in effect for many years before § 28-31.1 was added to it on July 26, 1955. Petitioner operated under Chapter 28 before the 1955 amendment. In respect to Chapter 28 and the regulation of interstation transfer vehicles under it before the 1955 amendment, petitioner says (petition p. 4):

> "The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago *under a comprehensive scheme for the regulation of such vehicles*. While Parmelee supplied the service it operated in compliance with the regulations prescribed by the City, and

the validity of those regulations was not questioned." (Emphasis added)

The "comprehensive scheme for the regulation" of terminal vehicles, which petitioner approves, remains intact. That means that the sole issue is the validity of § 28-31.1, and there is no substance to that.

Chapter 28 without § 28-31.1 embodies all general features of regulation which a state may lawfully impose upon interstate commerce: registration for identification and for purpose of enforcing valid police regulations, traffic regulations, and reasonable license fees. Section 28-31.1 attempted to add something to Chapter 28 that was not already there. The language used in § 28-31.1 was that of economic regulation which petitioner concedes, foot of page 9, cannot be imposed upon interstate commerce. In our part 2 hereafter we will show that the Council enacted § 28-31.1 for the purpose stated on its face, economic regulation. In view of that clear purpose it is idle for petitioner to argue that the Council intended the words it used to mean something other than what they say.

Before passing petitioner's page 10 we call attention to petitioner's statement that Transfer cannot obtain a certificate from the Interstate Commerce Commission and is not subject to Part II of the Interstate Commerce Act, which regulates Motor carriers. This statement is irrelevant. The interstation transfer service here involved is railroad transportation subject to Part I of the Act by force of 49 U.S.C. § 302(c)(2). This section is set out in part in the Opinion of the Court of Appeals (app. to petition, pp. 25a-26a) and in full in appendix hereto p. 23. Despite the conclusiveness on the issues of the Court's construction of § 302(c)(2), petitioner does not mention nor discuss this section and does not bring its construction here for review. We discuss this subject more fully hereafter in our part 5, p. 20.

The cases relied upon by petitioner in pages 9 to 20 do not sustain the validity of § 28-31.1; instead they show that it is invalid. Most discussed and most relied upon by petitioner are *Fry Roofing Co.* v. *Wood*, 344 U.S. 157 (1952); *Columbia Terminals Co.* v. *Lambert*, D.C. Mo., 30 F. Supp. 28 (1939), aff. 309 U.S. 620; and *Clark* v. *Poor*, 274 U.S. 554 (1927). All of the statutory provisions held valid as actually applied in those cases are in Chapter 28 now and have been for years. But the statutory provision in each case which the opinion says would be invalid as to interstate commerce, if enforced against it as written, is precisely the content of § 28-31.1. Each case involved a statute enacted at one time and in one piece containing features which could be and features which could not be enforced against interstate commerce. And in each case the category which the court said would be invalid as to interstate commerce is precisely descriptive of § 28-31.1.

There are other important distinctions between the cases relied upon by petitioner and the instant case. Section 28-31.1 was added after Chapter 28 had been long in effect. Section 28-31.1 comprised *only* economic regulation and thus was wholly different from the content of Chapter 28. Since Section 28-31.1 was all invalid as to interstate commerce the City could not avail itself of the device of claiming that it would enforce only the valid part of it. Since § 28-31.1 was a strange newcomer to Chapter 28 the Court properly viewed § 28-31.1 by itself and held it alone invalid, leaving the City with the same "comprehensive scheme" of regulation that it had had for many years.

So arises the question, why, when the City had this "comprehensive scheme for the regulation" of terminal vehicles, which petitioner indorses, did the City engraft § 28-31.1 upon it on July 26, 1955?

2.

ANSWER TO PETITIONER'S PART II

Section 28-31.1 was added to Chapter 28 on July 26, 1955, as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service pursuant to authority granted them by the Interstate Commerce Act, 49 U.S.C. § 302(c)(2). It had no other purpose. This device is an invalid economic regulation of interstate commerce.

Section 28-31.1 was enacted as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service, and the Court of Appeals was correct in so finding (app. to petition, p. 30a). It is idle for petitioner to contend otherwise. Since more than 99 per cent of the transfers are in interstate commerce, this device is an invalid economic regulation of interstate commerce which the railroads are performing under authority of 49 U.S.C. § 302(c)(2).

The situation in early July, 1955, was that Chapter 28 provided "a comprehensive scheme for the regulation" of terminal vehicles (petition p. 4). Sections 28-1 and 28-31 provided that no person could qualify for a terminal vehicle license unless he had a contract with railroads for transportation of passengers from terminal stations (petition pp. 5, 7). Petitioner had the only contract, was the only terminal vehicle operator, *and held the only terminal vehicle licenses outstanding.*

On June 13, 1955, the railroad appellees notified petitioner of the termination of their contract with petitioner effective September 30, 1955 (Tr. 82). On July 26, 1955, the Chicago City Council passed the 1955 ordinance (Tr. 44-45). It had three significant features. (1) It removed the requirement that the holder of a terminal vehicle license must have a contract with the railroads (petition p. 6). (2) It provided that any new applicant for a license must prove

public convenience and necessity (p. 7). (3) It authorized the "annual renewal" of petitioner's existing licenses without such proof (p. 7). Features 2 and 3 were provided by new § 28-31.1 (Tr. 44-45).

Section 28-31.1 was copied from and refers to an older section of Chapter 28, section 28-22.1, which regulates the issuing of taxicab licenses. Compare the two sections (app. to petition pp. 12a-13a and 16a-17a). Section 28-22.1, or a similar predecessor, was construed in *Yellow Cab Co.* v. *City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652 (1947). There it was held that the power delegated to the license commissioner and the City Council to determine "public convenience and necessity" confers the absolute power to bar new applicants for taxicab licenses in order to protect existing licensees from increased competition.

"The legislature is presumed to know the construction the statute has been given and by re-enactment it is assumed that it was intended that the new statute should have the same effect," *Lamere* v. *Chicago*, 391 Ill. 552, 559, 63 N.E. 2d 863, 866 (1945). "The rules for the construction of an ordinance are the same as those applied in the construction of a statute," *Dean Milk Co.* v. *Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944). The Council clearly intended, by the addition of § 28-31.1 to Chapter 28, to place the issuing of new terminal vehicle licenses under the same type of discretionary economic control as that expressed in § 28-22.1 in respect to taxicabs.

The phrase "public convenience and necessity" has no other meaning in Illinois law except economic regulation. The Supreme Court of Illinois, construing the Illinois Public Utilities Act,[2] holds uniformly that this phrase includes only economic regulation of carrier service, such as determination whether applicant shall be authorized to render

[2] Appendix hereto p. 24.

service, determination of which one of two or more competitors shall be selected to perform the service, protection of an established carrier against the entry of new competition, determination of economic benefit to the public, and similar purely economic considerations.[3] Conversely, the Illinois Court holds that "The Public Utilities Act of this State has no relation to the public health, safety or morals * * *."[4]

In view of the foregoing undisputed facts and clear decisions of Illinois law the cases relied upon by petitioner in pages 17 to 20 are not in conflict with the Court's decision here. Section 28-31.1 comprises nothing but economic regulation under the unanimous voice of Illinois authority. Therefore section 28-31.1 is not open to any possible construction as a valid police power regulation. The Illinois construction is binding here. Cases applying the construction of "public convenience and necessity" by other states cannot prevail over the Illinois construction.

This economic regulation cannot be imposed upon interstate commerce by a state. *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316 (1925). Distinctions between invalid economic regulation of interstate commerce and valid police power regulation were pointed out in *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570, 577 (1925), where the Court said in respect to economic considerations: "Clearly, these requirements have no relation to public safety or order in the use of motor vehicles on the highways * * *."

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[3] *Egyptian Transportation System* v. *Louisville and Nashville R.R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926); *Eagle Bus Lines, Inc.* v. *Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc.* v. *Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line* v. *Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp.* v. *Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926); *The Commerce Commission* v. *Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936).

[4] *Schiller Piano Co.* v. *Illinois Northern Utilities Co.*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919).

Precisely the same distinction was observed in *Schiller Piano Co.* v. *Illinois Northern Utilities Co., supra,* 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), where the Court said: "The Public Utilities act of this State has no relation to the public health, safety or morals * * *."

Moreover, Chapter 28 before the addition of § 28-31.1 constituted, as petitioner says, "a comprehensive scheme for the regulation" of terminal vehicles (petition p. 4) including many safety regulations. Section 28-31.1 did not add any safety regulations, but it did add the entirely new feature of economic regulation. It was intended only for that purpose. "The presumption is that every amendment of a statute is made to effect some purpose." *Acme Fireworks Corp.* v. *Bibb,* 6 Ill. 2d 112, 117, 126 N.E. 2d 688, 690-691, 127 N.E. 2d 444 (1955). The only possible purpose of § 28-31.1 was economic regulation.

In writing the foregoing paragraph we do not overlook numbered subsection 2 of § 28-31.1 providing that one of the criteria for determining public convenience and necessity is (app. to petition, 17a):

> "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation."

This is copied from § 28-22.1 (app. to petition, 12a). A brief analysis demonstrates that in the context of Chapter 28 and the 1955 amendment this is not a safety measure. Before the amendment the number of terminal vehicles was limited by former § 28-31 to the number needed by the holder of the transfer contract with the railroads (petition p. 6). The 1955 amendment removed that restriction. It authorized the automatic annual renewal of petitioner's existing licenses without compliance with § 28-31.1, thus permitting perpetual operation of the same number of vehicles that petitioner had operated under authority of

former § 28-31. The new subsection 2 of § 28-31.1 would apply to the vehicles needed by the new holder of the contract with the railroads. So, unless the amendment was designed to prevent the new contract holder from operating any vehicles, it contemplated that more terminal vehicles would be on the streets than were authorized before the amendment. A measure that increases the number of vehicles cannot claim to be a safety regulation.

3.

ANSWER TO PETITIONER'S PART III

Since § 28-31.1 is void on its face it was not necessary for respondents to apply for a license to conduct interstate commerce before attacking its constitutionality. Moreover, before this action was commenced, and under the issues made by the pleadings, and at all times, the City has taken the position and has advised respondents that it would enforce § 28-31.1 against respondents according to its terms.

Petitioner argues in part III, pp. 21-25, that respondents had no standing to attack the validity of § 28-31.1 until after their application for a license had been denied. This contention has no merit.

Respondents alleged in their complaint in District Court in great detail that § 28-31.1 is invalid on its face under the Interstate Commerce Act and the Commerce Clause, that before commencing this action they so advised the City, but that the City then insisted, and still insists, that it will enforce § 28-31.1 against respondents (R. 6-22, §§ 4, 14, 15, 16). These allegations were admitted by the City's motion for summary judgment (R. 71). The City has never disclaimed this purpose and intention. The District Court dismissed respondents' complaint (Tr. 160), and the City did its utmost to obtain affirmance of that judgment in the Court of

Appeals. See the City's brief in that Court, filed here, demanding, p. 59, that "The judgment of the District Court should be affirmed." The City has never disclaimed the intent to use § 28-31.1 to bar respondents' interstation transfer service.

The erroneous premise on which petitioner's contention rests is disclosed by petitioner's following statement (pp. 22-23):

> "Among the cases which have been cited herein, not one has held unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier operations *in the absence of an application for a license and a denial on unconstitutional grounds.* The cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied." (Italics are petitioner's.)

That statement is erroneous in every detail. Interstate motor carriers were granted injunctions by federal courts against enforcement of license laws, *without first applying for licenses*, on the ground that the license laws were unconstitutional, in *Barrett (Adams Express Co.)* v. *New York*, 232 U.S. 14 (1914); and in *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570 (1925), the latter being cited in the Opinion of the Court of Appeals (app. to petition, p. 24a). Interstate water carriers were granted injunctions under precisely similar facts and under precisely similar principles of law in *Sault Ste. Marie* v. *International Transit Co.*, 234 U.S. 333 (1914), and in *Toomer* v. *Witsell*, 334 U.S. 385 (1948). Intrastate motor carriers

successfully attacked state motor vehicle license laws under the 14th Amendment, without first applying for licenses, in non-injunction proceedings, in *Frost* v. *Railroad Commission of California*, 271 U.S. 583 (1926), and in *Smith* v. *Cahoon*, 283 U.S. 553 (1931). An interstate water carrier induced the federal courts to hold a license law invalid under the Commerce Clause without applying for a license in *St. Clair County* v. *Interstate Sand & Car Transfer Company*, 192 U.S. 454 (1904).

In *Smith* v. *Cahoon*, *supra*, 283 U.S. 553, 562, the Court said that where, as here, a statute unlawfully demands that an applicant prove public convenience and necessity it is not necessary to apply for a license before contesting the law's validity. In *Lovell* v. *Griffin*, 303 U.S. 444, 452-453 (1938), which involved the First Amendment, the Court said, citing *Smith* v. *Cahoon*, *supra*:

> "As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it."

In *Jones* v. *Opelika*, 316 U.S. 584, 599 (1942), which also involved the First Amendment, the Court said, also citing *Smith* v. *Cahoon*, *supra*:

> "In *Lovell* v. *Griffin*, 303 U.S. 444, we held invalid a statute which placed the grant of a license within the discretion of the licensing authority. By this discretion the right to obtain a license was made an empty right. Therefore the formality of going through an application was naturally not deemed a prerequisite to insistence on a constitutional right."

It is beyond question that when an ordinance is void on its face it is not necessary to apply for a license before contesting its validity. Section 28-31.1 is void on its face. It requires that before engaging in interstate commerce under authority of 49 U.S.C. 302(c)(2) respondents must apply for a license and prove public convenience and neces-

sity (app. to petition pp. 16a-17a). Section 28-31.1 has no other purpose whatsoever. Before the amendment of July 26, 1955, respondents could have obtained a license and complied with Chapter 28. Section 28-31.1 closed that door. Since § 28-31.1 supplanted the prior application requirements, it must be construed to change those requirements according to its precise language. Respondents either had to submit to its unlawful restraints upon interstate commerce or ask the Court to enjoin its threatened enforcement.

In *Smith* v. *Cahoon*, *supra*, 283 U.S. 553, the state urged that the Court leave undisturbed the statute requiring proof of public convenience and necessity, with the understanding that when application was made for a certificate the state would sift out the invalid from the valid requirements and would invoke only those provisions which in its judgment were "legally applicable." Petitioner seems to be making a precisely similar proposal in the instant case. This Court held that the carrier could not be required to submit to such haphazard administration of his constitutional rights, 283 U.S. pp. 563-566.

4.

ANSWER TO PETITIONER'S PART IV

The legislative history of § 28-31.1 was made relevant, if not independently so, by the insistence of the City and petitioner that § 28-31.1 should be given a construction different from its plain terms. In such a case the official minutes of the Chicago City Council Committee are admissible to prove legislative intent.

Petitioner's argument and authorities under its part IV, pp. 25-28, are not apposite. The cases cited did not involve the use of competent and relevant materials of legislative history to prove legislative intent. The rule applicable

here was stated in *United States v. International Union U.A.W.*, 352 U.S. 567, 570 (1957):

> "Appreciation of the circumstances that begot this statute is necessary for its understanding * * *."

In *City of Rockford* v. *Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921), the Court said, in words closely applicable to the instant case:

> "The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, *and the apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

> "The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People* v. *Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

> "Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison* v. *Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made

the statement attributed to it in consulting the report of a committee.

In *Boshuizen* v. *Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

> "For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

The Court of Appeals did not attribute "to the City Council improper motives" (petition, p. 26). The Court quoted verbatim official legislative records of the City, the Council Committee minutes. These minutes state clearly the Committee's legislative intent, and neither petitioner nor anyone else has attempted to claim that the minutes do not say what the Court said they say. These minutes are "the only lawful evidence of the action to which they refer," *Western Sand & Gravel Corpn.* v. *Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

Petitioner here (petition pp. 9-10) and in the Court of Appeals (appellees' brief pp. 52-58) contends that the words "public convenience and necessity" have a meaning different from that accorded them by the Supreme Court of Illinois. While the legislative history seems independently relevant, petitioner's contention makes it so under the narrowest possible construction of the principle of resort to legislative history.

The legislative history confirms what is shown by the textual evolution and plain language of § 28-31.1. On June 13, 1955, the railroads notified petitioner that their contract with petitioner would end on September 30, 1955 (Tr. 82). Petitioner transmitted this information to the Chairman

of the Committee on Local Transportation of the Chicago City Council (Tr. 93). On June 16, 1955, the Chairman drafted and introduced in the Council a proposed ordinance which would give petitioner a ten-year exclusive franchise to transfer railroad passengers to and from railroad stations (Tr. 85-89, 93-95, 44). The following is from the official minutes of the meeting of July 21, 1955, of the Council Committee, duly certified by the City Clerk (Tr. 93-94):

> "The committee then took up for consideration item No. 2 on the agenda—a proposed ordinance granting authority for and licensing the operation of terminal vehicles within the City of Chicago.
>
> "Chairman Sheridan stated that recently he was advised by the Vehicle License Commissioner that he had received a communication from the Parmelee Transportation Company advising that its contract with the railroads was to be cancelled out in September of this year, which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the City Council and referred to the committee; that subsequently, he had discussed said ordinance with Mr. Grossman of the Corporation Counsel's office, and that as a result of his conference with Mr. Grossman, it would appear that while he—Chairman Sheridan—was on the right track in the matter, his method of approach was wrong.
>
> "Mr. Grossman, who was present at the request of the committee, stated that he had looked over the ordinance as introduced by Chairman Sheridan and is of the opinion that the ordinance is not in proper form; but that he believes the objective can be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject to the committee before the next meeting.

"At the suggestion of Chairman Sheridan, the committee voted to hold a recessed session Tuesday morning, July 26, 1955, at 9:30 o'clock for the purpose of considering such ordinance as Mr. Grossman may submit."

A reporter's transcript of this meeting, not identified as a record of the City, contains the following (Tr. 91):

"Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council."

The following is the official minutes of the meeting of July 26, 1955, of the Council Committee (Tr. 95):

"Chairman Sheridan stated that this recessed session was being held to receive a report from Mr. Grossman on the proposed ordinance (referred June 16, 1955) granting authority for and licensing the operation of terminal vehicles within the City of Chicago. He said that Mr. Grossman had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the City of Chicago, whereas as the Code now provides, the only one who can secure a license for the operation of a terminal vehicle is someone who has a contract with the railroads.

"Alderman Burmeister moved that the committee recommend to the City Council that it pass the proposed substitute ordinance drafted by Mr. Grossman.

"Alderman McGrath seconded the motion.

"The motion prevailed."

The substitute ordinance so drafted and recommended for passage was passed by the Council on July 26, 1955, and is what is referred to as the "1955 amendment" or "1955 ordinance" containing *inter alia* § 28-31.1 (Tr. 44-45). Section 28-31.1 was copied from a taxicab section of Chapter 28. See part 2 hereof, p. 8.

Answering the argument that § 28-31.1 embodied only valid police power regulation (app. to petition, 28a-29a), the Court of Appeals said in part (30a):

> "At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power."

5.

The Court of Appeals held that 49 U.S.C. § 302(c)(2) confers upon respondents the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Petitioner has not appealed from that ruling. That unchallenged construction requires affirmance of the judgment of the Court of Appeals.

Petitioner in its petition for certiorari does not mention or refer in any way to 49 U.S.C. § 302(c)(2), despite the Court's holding that this statute confers upon respondents the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Section 302(c) is set out in essential part in the Court's opinion (app. to petition pp. 25a-26a) and in full in the appendix hereto p. 23. Petitioner does not mention, discuss, or question the Court's construction of § 302(c)(2) and its effect upon the issues (pp. 25a-28a, 30a-31a).

Petitioner thus has not presented for review the Court's construction of 49 U.S.C. § 302(c)(2). Supreme Court Rule 23, paragraph 1, subparagraphs (c), (d) and (h). That unchallenged construction requires affirmance of the judgment.

By force of § 302(c)(2), the interstate interstation transfer service (more than 99 per cent of the total) performed under the contract between the railroads and Transfer is "considered to be performed" by the railroads "as part of, and shall be regulated in the same manner as, the transportation by railroad * * * to which such services are incidental." The service is performed pursuant to tariffs filed with the Interstate Commerce Commission by the railroads (Tr. 74-81; Rheintgen Affidavit).

Section 302(c)(2) grants to the railroads rights to perform transfer between terminals by motor vehicle which are at least equal in status to the rights conferred by a certificate issued under 49 U.S.C. § 307. Compare the decisions of the Interstate Commerce Commission in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin;* before the enactment of § 302(c)(2), in 238 I.C.C. 671, 678 (1940); and after its enactment, in 248 I.C.C. 385, 397 (1942). The Commission can, by force of § 302(c), compel railroads to perform interstation transfer service, *Cartage Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947). While the Commission cannot deny or suspend operations being performed within the lawful limits of § 302(c), *the Commission alone has the power to deny or suspend operations not lawful under that section. New York S.&W.R.Co. Application*, 46 M.C.C. 713 (1946); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954); *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955).

The Court therefore held that the rights conferred by 49 U.S.C. § 302(c) are equal in status to those conferred by a certificate under 49 U.S.C. § 307, and that the rule of

Castle v. *Hayes Freight Lines*, 348 U.S. 61 (1954), applies to the interstation transfer service here involved (app. to petition pp. 30a-31a).

That construction of § 302(c) is obviously correct. Neither petitioner here, nor the City of Chicago in No. 905, has questioned it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SECTION 202 (c) OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 302 (c).

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

ILLINOIS REVISED STATUTES, 1955, CH. 111⅔, § 56, LAWS OF 1913, P. 460, LAWS OF 1921, P. 731.

§ 55. *Certificate of convenience and necessity—Alteration.* No public utility shall begin the construction of any new plant equipment, property or facility, which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

* * * * *